Supreme Court, U.S.
FILED

02 1758 APR 21 2003

OFFICE OF THE CLERK

No.

In the

Supreme Court of the United States

ASHLEY CREEK PHOSPHATE CO.
&
STATE OF UTAH
Petitioners,

v.

CHEVRON USA, INC. et al.
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

APPENDIX TOPETITION FOR WRIT OF CERTIORARI

E. Craig Smay
Counsel of Record
c/o E. Craig Smay, P.C.
174 E. South Temple
Salt Lake City, UT 84111
(801) 539-8515
Attorney for Petitioner.

37 pp

TAB 1

PUBLISH

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

ASHLEY CREEK PHOSPHATE COMPANY,

Plaintiff-Counter-Defendant-Appellant,

and

STATE OF UTAH,

Plaintiff-Counter-Defendant,

No. 01-4017

v.

CHEVRON USA, INC.; SF PIPELINE LIMITED COMPANY; SF PHOSPHATES LIMITED COMPANY; J.R. SIMPLOT COMPANY; FARMLAND INDUSTRIES, INC., a Delaware corporation; CHEVRON CHEMICAL COMPANY, a Delaware Corporation; CHEVRON PIPE LINE COMPANY, a Delaware corporation;

CHEVRON CORPORATION,
a Delaware corporation,

Defendants-Counter-
Claimants-Appellees.

ASHLEY CREEK PHOSPHATE
COMPANY,

Plaintiff-Counter-
Defendant,

and

STATE OF UTAH,-

No. 01-4031

Plaintiff-Counter-
Defendant-Appellant,

v.

CHEVRON USA, INC.;
SF PIPELINE LIMITED
COMPANY; SF PHOSPHATES
LIMITED COMPANY;
J.R. SIMPLOT COMPANY;
FARMLAND INDUSTRIES,
INC., a Delaware corporation;
CHEVRON CHEMICAL
COMPANY, a Delaware
Corporation; CHEVRON
PIPE LINE COMPANY, a

Delaware corporation;
CHEVRON CORPORATION,
a Delaware corporation,

Defendants-Counter-
Claimants-Appellees.

Appeal from the United States District Court for the District of Utah (D.C. Nos. 89CV-554-K and 96CV-340-K)

E. Craig Smay, Salt Lake City, Utah, (Philip Pugsley, Assistant Attorney General, State of Utah, Salt Lake City, Utah, with him on the briefs), for Ashley Creek Phosphate Company and State of Utah, Plaintiffs-Counter-Defendants-Appellants.

Peter W. Billings, Fabian & Clendenin, Salt Lake City, Utah, (Douglas B. Cannon, Fabian & Clendenin, Salt Lake City, Utah; James S. Jardine, Jonathan A. Dibble, and Cameron M. Hancock, of Ray, Quinney & Nebeker, Salt Lake City, Utah, with him on the briefs), for SF Pipeline Limited Company; SF Phosphates Limited Company, J.R. Simplot Company; Farmland Industries, Inc.; and FS, Inc., Defendants-Counter-Claimants-Appellees.

E. Scott Savage, (Stephen R. Waldron, with him on the briefs), Berman, Gaufin, Tomsic & Savage, Salt Lake City, Utah, for Chevron USA, Inc.; Chevron Industries, Inc.; Chevron Chemical Company; Chevron Pipe Line Company; and Chevron Corporation, Defendants-Counter-Claimants-Appellees.

Before **KELLY**, Circuit Judge, **BRORBY**, Senior Circuit Judge, and **MURPHY**, Circuit Judge.

MURPHY, Circuit Judge.

INTRODUCTION

Ashley Creek Phosphate Company ("Ashley Creek") brought suit against Chevron Corporation and several related entities (collectively "Chevron") and J.R. Simplot Company, Farmland Industries, Inc., and three entities owned by, or operated as joint ventures between, Simplot and Farmland (collectively "SF"). Ashley Creek alleged, *inter alia*, that Chevron and SF violated various provisions of the Sherman and Clayton Acts by refusing to set reasonable tariffs for a pipeline utilized to transport phosphate concentrate slurry. The state of Utah brought claims against Chevron identical to and derivative of Ashley Creek's claims. Chevron and SF responded by filing state-law counterclaims against Ashley Creek, asserting that it had filed its complaint and initiated other proceedings in bad faith and without a justifiable basis.

The district court granted summary judgment in favor of Chevron and SF on the antitrust claims, concluding that: (1) Ashley Creek lacked standing to bring its antitrust claims; and (2) in the alternative, the tariffs announced by Chevron and SF for the use of the pipeline were reasonable. Because Utah conceded that its claims were "entirely derivative" of Ashley Creek's claims, the district court dismissed Utah's claims against Chevron on the same bases. The district court dismissed Chevron's and SF's state-law counterclaims without prejudice after disposing of all of the federal claims.

Ashley Creek appeals, contending that the district

court erred in granting summary judgment in favor of Chevron and SF on the antitrust claims (No. 01-4017) and in refusing to dismiss Chevron's and SF's state-law counterclaims with prejudice (No. 01-4066). Utah appeals the district court's grant of summary judgment to Chevron (No. 01-4031). This court exercises jurisdiction pursuant to 28 U.S.C. § 1291 and, for the reasons set out below, **affirms** in part, **dismisses** in part, **reverses** in part, and **remands** to the district court for further proceedings consistent with this opinion.

Appeal Nos. 01-4017, -4031

I. BACKGROUND

The factual and procedural background of this case is lengthy and complex. We set forth only those very limited background facts necessary to put the legal dispute and this court's decision in context.

A. Factual/Procedural Background

In the 1980's, Chevron built an integrated phosphate fertilizer project was to utilize sulfur by-product from Chevron's natural gas operations in Carter Creek, Wyoming. Rather than attempt to sell the sulfur to existing phosphate fertilizer producers, Chevron chose to produce phosphate fertilizer itself. Entry into the phosphate fertilizer business was consistent with Chevron's preexisting nitrogen fertilizer business and fertilizer distribution system.

In furtherance of this plan, Chevron purchased an operating phosphate mine located near Vernal, Utah. Because it was roughly equidistant between Carter Creek

and Vernal, and because it was a railhead, Chevron chose to construct its fertilizer plant in Rock Springs, Wyoming. Chevron built a pipeline to transport phosphate concentrate slurry from the Vernal mine to the fertilizer plant in Rock Springs. The pipeline runs over lands owned by the United States, including environmentally sensitive lands, pursuant to a right-of-way issued by the Bureau of Land Management ("BLM"). The project became operational with the first shipments of phosphate concentrate through the pipeline sometime after May of 1986.[1]

The state of Utah also owns phosphate deposits in Vernal within a reasonable proximity to the phosphate mine purchased by Chevron. Utah has leased some or all of its phosphate holdings in Vernal to Ashley Creek.[2] When

---

[1]When Chevron purchased the Vernal phosphate mine it assumed an existing phosphate sales contract with Cominco, Ltd., a phosphate fertilizer producer in western Canada. Prior to the time the pipeline became operational, Chevron supplied Cominco by trucking phosphate to a railhead near Park City, Utah. In 1988, Cominco cancelled its phosphate contract with Chevron, concluding that it could obtain all the phosphate it needed at a lower cost from its own mining operations. Neither Chevron nor its successor-in-interest, SF, ever sold phosphate concentrate to a third-party after 1988, despite repeatedly trying to find outsider purchasers. During the entire time Chevron owned and operated the pipeline, no additional phosphate mines were developed in the United States and, after 1988, there were no third-party phosphate sales from a western United States phosphate mine. In 1992, Chevron completely exited the business by selling its interest in the entire integrated fertilizer project to SF for $64 million, only half of what it paid for the Vernal mine alone.

[2]As set out more fully below, Ashley Creek has no employees, no credit history, and no assets other than these undeveloped phosphate leases. John Archer, Ashley Creek's sole shareholder, pays, on behalf of Ashley Creek, $11,000 per year for the leases.

Ashley Creek learned that Chevron intended to construct a pipeline to transport phosphate from Vernal to Rock Springs, it approached Chevron about the possibility of constructing the pipeline as a joint venture. In fact, Ashley Creek requested tat the BLM condition the granting of any right-of-way "upon requirements that operators of nearby properties which may be benefitted by a pipeline be given reasonable opportunity to participate in the line upon payment of an appropriate share of expenses." The BLM denied this request on the grounds that it understood the proposed pipeline would be subject to the jurisdiction of the Interstate Commerce Commission ("ICC") and that Ashley Creek would be able to ship its phosphate through the pipeline under tariffs set by the ICC.

In November of 1986, Ashley Creek approached Chevron requesting rate information for the shipment of phosphate slurry through the pipeline. Although Chevron provided Ashley Creek with preliminary rate estimates, it refused to publish a tariff. In response, Ashley Creek filed a complaint with the ICC alleging that Chevron was a common carrier by pipeline unlawfully operating without a tariff. In a decision issued in 1989, the ICC determined that Chevron was a common carrier and ordered it to establish rates and file a tariff for the transportation of phosphate slurry through the pipeline. *Ashley Creek Phosphate Co. v. Chevron Pipe Line Co.*, 5 I.C.C.2d 303 (1989).

In response to the order, Chevron published a tariff. On June 19, 1989, the day before the tariff became effective, Ashley Creek and Utah filed suit against Chevron, asserting that Chevron's actions with regard to the pipeline violated the antitrust laws of the United States. Shortly

thereafter, the ICC, Ashley Creek, Utah, and Chevron all agreed and stipulated as follows: "[t]he determination of whether the rates which [Chevron has] established in its tariff for transporting phosphate through the Chevron slurry pipeline from Vernal, Utah, to Rock Springs, Wyoming, are unjust, discriminatory or unreasonable, is hereby referred to the [ICC]." The district court stayed resolution of Ashley Creek's and Utah's antitrust claims against Chevron pending the resolution of the issues referred to the ICC.

For the next seven years, the reasonableness of the published tariffs on the phosphate pipeline was litigated before the ICC and its successor agency, the Surface Transportation Board ("STB").[3] While the matter was pending before the ICC, Chevron published a revised tariff in August of 1991 and a second revised tariff in February of 1992. Each revised tariff reduced the rates of the prior tariff. In April of 1992, Chevron sold its entire integrated phosphate fertilizer project to SF. SF immediately adopted the Chevron tariff then in effect. In response to this transaction, Ashley Creek filed a complaint with the ICC naming SF as a defendant and repeating the allegations regarding the pipeline set out in its original ICC filing. The ICC consolidated the two complaints and indicated that it would apply the identical ratemaking methodology in both cases.

In October of 1996, the STB issued a decision on Ashley Creek's consolidated administrative complaints (the

---

[3]The ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803 (1995), abolished the ICC and transferred certain functions and pre-existing proceedings to the STB effective January 1, 1996.

"1996 Order"). *Ashley Creek Phosphate Co. v. Chevron Pipe Line Co.*, Nos. 40131, 40810, 1996 WL 625471 (S.T.B. 1996). The STB found that the published tariffs were "unreasonable for shipments at many volume levels." *Id.* at ¯19. It nevertheless concluded that "there may be certain shipping patterns where the tariff rate structure would be reasonable," and ultimately summarized its decision as follows:

> On the record developed in this proceeding, we are unable to determine the size of the phosphate market, nor can we evaluate whether Ashley Creek[] has the ability to serve that market. Rather, it is for the court in the underlying antitrust action to determine whether Ashley Creek was ever in a position to market phosphate, or will be in the future, and to determine the size of the potential market for phosphate that could be delivered by this pipeline. It may be that the court will conclude that one of our other volume usage scenarios[4] – or, indeed, a scenario that we did not even consider at all – is more useful for purposes of the antitrust litigation. Our role is simply to assist the court by presenting a framework for addressing the narrow issue that is the subject to our primary jurisdiction. We find:

Defendants' subject tariffs covering the transportation of phosphate slurry from Vernal, UT to Rock Springs, WY,

---

[4]Appended to the 1996 Order were several tables evaluating the reasonableness of the tariffs at different volumes of phosphate shipped through the pipeline.

are unreasonable to the extent discussed in this decision.

Id. (footnote omitted).[5]

After the STB issued the 1996 Order, the district court granted Ashley Creek permission to file an amended complaint alleging antitrust claims against SF. The district court further indicated that the stay it had previously entered pending the STB's resolution had expired as a result of the issuance of the 1996 Order. Utah declined to join Ashley Creek's amended complaint to the extent it stated claims against SF; instead, SF and Utah entered into an agreement whereby SF guaranteed that the tariff then in effect would not be raised.[6]

---

[5]The parties vigorously contested before the district court, and continue to contest on appeal, whether the 1996 Order definitively concluded that the published tariffs were unreasonable or, instead, merely provided a framework for analyzing the reasonableness of the tariffs for the district court to apply. The district court concluded that the 1996 Order merely set out an analytical framework to be applied by it and that the necessary analysis "hinge[d] on the resolution of substantial factual questions." Utilizing a new tariff published by SF in 1999, along with the tree previously published tariffs utilized by the STB in conducting its analysis, the district court ultimately concluded that the tariffs were reasonable. In light of this court's affirmance *infra* of the district court's conclusion that Ashley Creek lacks standing to bring its antitrust claims, we need not address the propriety of the district court's alternative ruling that the published tariffs were reasonable.

[6]In 1999, SF published a new tariff, the fourth tariff to be published since 1989. The fourth tariff recovers only operating and new capital costs, not original capital costs. Although this fourth tariff played a key role in the district court's decision that the published tariffs on the pipeline were reasonable, this court need not reach the issue.

B. District Court Order

After the STB issued its 1996 Order and the district court indicated that its previously imposed stay had expired, SF filed a motion for summary judgment. In its motion, SF asserted that it was entitled to summary judgment on two independent bases: (1) Ashley Creek failed to demonstrate that it had standing to bring its antitrust claims; and (2) its tariff for the use of the pipeline was not exclusionary. The district court granted the motion, ruling in favor of SF on each of the independent bases advanced in its motion.

The district court began by noting that to have standing to bring antitrust claims, Ashley Creek must demonstrate: (1) it has an antitrust injury to either its business or its property; and (2) there is a direct causal connection between that injury and the alleged violation of antitrust laws. *See SportsRacing Serv. Inc. v. Sports Car Club of Am., Inc.*, 131 F.3d 874, 882 (10th Cir. 1997). Ashley Creek asserted both injury to its business (exclusionary tariffs prevented it from entering the phosphate concentrate and phosphate fertilizer industries) and injury to its property (those same exclusionary tariffs impaired the value of its mineral leases). Nevertheless, because Ashley Creek had never been in the business of selling phosphate concentrate or producing and selling phosphate fertilizer, the district court concluded that Ashley Creek could not demonstrate an "antitrust injury" to its business unless it could demonstrate that it "manifested an intention to enter" the market **and** "a preparedness to do so". *Curtis v. Campbell-Taggert, Inc.*, 687 F.2d 336, 338

(10th Cir. 1982). With these standards in mind, the district court concluded that Ashley Creek failed to demonstrate either an antitrust injury or a causal nexus between the alleged antitrust injury and the alleged antitrust violation.

As to the antitrust-injury prong of the standing requirement, the district court assumed, without deciding, that Ashley Creek manifested an intention to enter the relevant markets; it concluded, however, that Ashley Creek failed to demonstrate preparedness to enter the market. In summary, the district court determined that: (1) Ashley Creek had failed to determine whether there is a market for phosphate and the price Ashley Creek would have to charge to cover its costs if the pipeline tariff were zero; (2) Ashley Creek had not even come close to taking the affirmative steps necessary to obtain financing of a capital intensive venture; and (3) Ashley Creek did not have any background or experience in mining, milling, or selling phosphate or phosphate fertilizer. The district court specifically rejected Ashley Creek's claim that SF's allegedly excessive tariffs excused it from taking steps to enter the market. The district court noted that there were numerous steps necessary for market entry that were completely unrelated to the cost of shipping phosphate from vernal to Rock Springs. For these exact same reasons, the district court also concluded that Ashley Creek had failed to satisfy the causal-nexus prong of the standing requirement.

The district court likewise rejected Ashley Creek's claim that it had standing solely by virtue of its mineral leases. The district court noted that the mineral leases, for which Ashley Creek pays the sate of Utah approximately

$11,000 per year, were only a minor component in the development of a heavily capital-intensive industry. Because Ashley Creek had failed to establish its viability in the relevant markets, the district court concluded that it would be mere speculation to recognize the leasehold interest as being injured. In that regard, the district court noted that mineral leases only hold value if the minerals can be economically mined, milled, and sold; without showing that its leases could be developed economically, the district court concluded that Ashley Creek could only speculate on their value.

Although the district court concluded that Ashley Creek did not have standing to bring its antitrust claims, it nevertheless went on the analyze whether SF's tariffs were sufficiently unreasonable to be exclusionary under the essential facilities doctrine. *See generally City of Chanute v. Williams Natural Gas Co.*, 955 F.2d 641, 647-649 (10th Cir. 1992) (discussing essential facilities doctrine). Utilizing the framework set forth in the 1996 Order, the district court concluded that SF's tariffs were not unreasonable, when considered together and over the twenty-year life of the pipeline, because the tariffs actually resulted in a significant under-collection with regard to return on capital.

In light of the district court's grant of summary judgment to SF, Chevron filed a summary judgment motion contending that it was entitled to summary judgment on the same grounds. Ashley Creek did not contest that the district court's resolution of SF's summary judgment motion would also necessitate dismissal of its claims against Chevron. Instead, Ashley Creek argued that the

district court's order granting summary judgment to SF was wrongly decided. The district court therefor treated Ashley Creek's memorandum in opposition to Chevron's summary judgment motion as a motion for reconsideration. So construed, the district court denied the motion on the grounds that it was not supported by previously unavailable evidence or an intervening change in controlling law. *See* Fed. R. Civ. P. 59(e). The district court then granted Chevron summary judgment for the same reasons previously articulated in granting SF summary judgment.

II. DISCUSSION

A. Standard of Review

This court reviews a grant of summary judgment *de novo*, applying the same standard used by the district court under Fed. R. Civ. P. 56 (c). *Sports Racing*, 131 F.3d at 882. Summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed R. Civ. P. 56 (c). Although this court has noted that in the broad sense summary judgment should be used sparingly in antitrust cases, "the usual rules governing summary judgment still apply." *Sports Racing*, 131 F.3d at 882; *see also Curtis*, 687 F.2d at 338 ("Summary procedures are to be used sparingly in anti-trust litigation. But where . . . the record clearly indicates that there are no circumstances under which plaintiff can prevail, summary procedures are appropriate to avoid needless trials and unnecessary expense."). "Moreover,

even in antitrust cases, we are not limited to the grounds upon which the trial court relied but may base summary judgment on any proper ground found in the record to permit conclusions of law." *Sports Racing*, 131 F.3d at 882 (quotation and alteration omitted). The district court's ruling that Ashley Creek lacked standing under Section 4 of the Clayton Act, 15 U.S.C. § 15, is a question of law subject to *de novo* review. Id.

B. Analysis

Section 4 of the Clayton Act confers on private parties the power to enforce federal antitrust laws. *See* 15 U.S.C. § 15(a) ("[A]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor [in the appropriate federal district court]."); *see also id.* § 12(a) (defining "antitrust laws"). Although Section 4 appears to be a broad grant of standing, "a plaintiff's right to sue for money damages is subject to a number of limitations unique to the antitrust laws that are based upon the express words of the statute and policies found by courts to be implicit in the structure and purpose of the antitrust laws." ABA Section of Antitrust Law, *Antitrust law Developments* 839 (5th ed. 2002); *see also id.* 839 n. 29 (collecting cases); *Reazin v. Blue Cross & Blue Shield of Kan.*, 899 F.2d 951, 962 n. 16 (10th Cir. 1990) ("We are also aware that the Supreme Court may be concerned about reading section 4 of the Clayton Act too broadly."). "To maintain standing to bring an antitrust claim under § 4 of the Clayton Act, 15 U.S.C. § 15, a plaintiff must show (1) an `antitrust injury'; and (2) a direct causal connection between that injury and a defendant's violation of the antitrust laws." *Sports Racing*,

131 F.3d at 882.

> To meet the first prong [a plaintiff] must allege a business or property injury, an antitrust injury, as defined by the Sherman Act. An antitrust injury is defined as an injury of the type the antitrust laws were intended to prevent and that flows from that which makes [the defendant's] acts unlawful. A violation of the Act without resultant injury to the [plaintiff] is insufficient to confer standing, [plaintiff] must show the antitrust injury resulted directly from [the defendant's]violation of antitrust law.

City of Chanute, 955 F.2d at 652 (citations and quotations omitted).

Ashley Creek claims that Chevron's and SF's allegedly exclusionary tariffs for the use of the phosphate slurry pipeline caused an antitrust injury to both Ashley Creek's business and property. An antitrust injury to *either* Ashley Creek's business *or* property would be sufficient to confer standing on Ashley Creek to raise the instant antitrust claims. *See* 15 U.S.C. § 15(a).

1. Injury to Business

Ashley Creek is not, and has never been, in the business of mining and selling phosphate concentrate.[7]

---

[7]To the extent that Ashley Creek's appellate filings could be read to hint at an antitrust claim relating to its potential entry into the phosphate fertilizer market, we agree with the district court that there is absolutely no evidence in the record that Ashley Creek was ever

"However, most courts have not required a plaintiff to actually be engage in an ongoing business in order to have standing under the anti-trust laws. It is sufficient if he has manifested an intention to enter the business and has demonstrated his preparedness to do so." *Curtis*, 687 F.2d at 338 (quotation omitted); *see also* ABA Section of Antitrust Law, *Antitrust Law Developments* 842 & n.38 (5th ed. 2002) (collecting cases for following proposition: "[M]ost courts have held that injury to an enterprise in the planning stage is actionable, provided that the plaintiff has an intent and capability to enter the market and has achieved a sufficiently advanced state of preparation for doing so."). This court has identified the following as "key elements" in evaluating the plaintiff's preparedness to enter a business: (1) ability to finance the business and purchase the necessary facilities and equipment; (2) consummation of contracts needed for the proposed venture; (3) affirmative actions by the plaintiff to engage in the proposed business; and (4) the background and experience of the plaintiff in the prospective business. *Curtis*, 687 F.2d at 338. In examining preparedness, courts have uniformly

> drawn the line at the point where promotion transcends the level of hopes, desires, and expectations, and reaches a certain stage of maturity and concreteness, a stage where it is

---

prepared to enter that market. Accordingly, this court, like the district court, restricts its analysis to Ashley Creek's claims regarding the phosphate concentrate market.

> accompanied by certain indicia of ultimate success. Put another way, the courts have held that a potential competitor cannot achieve standing merely by demonstrating his *intention* to enter a field; he must also demonstrate his *preparedness* to do so.

Hecht v. Pro-Football, Inc., 570 F.2d 982, 994 (D.C. Cir. 1977) (cited with approval in *Curtis*, 687 F.2d at 338).

In analyzing whether Ashley Creek could demonstrate standing under the standards set out by this court in *Curtis*, the district court began by assuming, without deciding, that Ashley Creek had manifested its intention to enter the phosphate concentrate market. The district court concluded, however, that Ashley Creek could not satisfy any of the key elements identified in *Curtis* for measuring preparedness to enter the phosphate concentrate market. In that regard, the district court noted that Ashley Creek's own estimates placed the cost of entering the phosphate concentrate market at something in excess of $67 million during the relevant time frame. The record revealed, however, that Ashley Creek had only a thousand dollars on hand and had done nothing to obtain financing. The record further revealed that Ashley Creek had completed only a limited "Type 1" feasibility study, and that a "Type 3" or "Type 4" study would be necessary to secure financing. In addition, the district court noted that Archer, Ashley Creek's sole shareholder, testified that to obtain financing Ashley Creek would need signed contracts with customers to purchase phosphate concentrate at a specified price. The record revealed, however, that Ashley Creek had never discussed price with any potential customer. The

district court noted that this was most likely because Ashley Creek's very preliminary feasibility study left it unable to project its own costs of production at anything less than a margin of error of plus or minus 25%. In fact, Ashley Creek did not know whether there were any customers who would buy concentrate at the price Ashley Creek would have to charge even if the tariff was zero. Finally, the district court noted that although Archer, the only then-current officer of Ashley Creek, did have experience in buying and selling phosphate reserves, he did not have any experience in mining and selling phosphate concentrate.

The district court likewise rejected Ashley Creek's assertion that it was not required to demonstrate any further preparatory steps to enter the phosphate concentrate market because the actions of Chevron and SF had rendered such steps futile. Although noting that not all courts had adopted such a futility exception and that this court had yet to decide the question, the district court nevertheless concluded that Ashley Creek failed to fall within the ambit of the rule. The district court pointed out that Ashley Creek's assertion that it could not conduct relevant feasibility studies because Chevron had refused to publish a tariff was not borne out by the record. In particular, at no time after Chevron published a tariff in 1989 did Ashley Creek take steps to determine whether it was economically feasible to sell phosphate under the 1989 tariff or any of the successively lower tariffs. This was true even after the State of Utah and SF entered into a settlement agreement guaranteeing that the tariff would not be raised and after SF published the fourth tariff which recovers only operating and new capital costs and no original capital costs. More importantly, the district court noted that even assuming

some or all of the first three tariffs were too high, Ashley Creek was not prevented from determining: (1) what price customers were willing to pay for phosphate concentrate, assuming there was actually a market for phosphate concentrate; (2) the freight cost to ship phosphate concentrate from the railhead in Rock Springs; or (3) its own production costs with sufficient precision to know the significance of a few dollars difference in the tariff. These factors, coupled with Archer's deposition testimony that Ashley Creek would not move forward with its project, regardless of the amount of the applicable tariff, without owning a 40% share of the pipeline, led the district court to conclude that a futility exception did not apply.

Although its brief before this court is less than clear, Ashley Creek appears to challenge both the district court's ruling that it lacked standing because it failed to demonstrate preparedness to enter the phosphate concentrate market and the district court's ruling that its lack of preparation is not excused by some futility exception to the preparedness doctrine. Neither of Ashley Creek's arguments are convincing.

This court can easily dispose of Ashley Creek's assertion that it was, in fact, prepared to enter the market during the relevant time frame. [8] Ashley Creek sets out the

[8]We note with some frustration that Ashley Creek completely fails to distinguish between the actions of Chevron and SF in asserting that it was prepared to enter the market for phosphate concentrate. Whether Ashley Creek was prepared to enter the market during the time Chevron controlled the pipeline is a distinct question from whether Ashley Creek was prepared to enter the market when SF was in control of the pipeline. Likewise, whether the actions of Chevron or SF rendered such preparation futile presents different questions.

following list of eleven steps that it took prior to the point Chevron refused to publish a tariff: (1) obtained the mineral leases; (2) hired a mining engineer to explore the leaseholds and test the ore and provide a preliminary assessment of the economic feasibility of producing phosphate concentrate; (3) obtained the promise of common carriage in the pipeline; (4) obtained a contract necessary for water[9]; (5) filed a mine plan and commenced acquisition of necessary permits; (6) commenced acquisition of an appropriate plot of land at Rock Springs[10];

Ashley Creek never distinguished between the actions of Chevron and SF before the district court and does not do so on appeal. Nevertheless, our review of the entire appellate record leads this court to conclude that Ashley Creek was never prepared to enter the market during the entire time frame at issue.

[9]Although Ashley Creek asserts in its brief that it "obtained a contract" for water, it does not appear that such a contract was ever executed. Instead, the record demonstrates only that it engaged in negotiations with the Uintah Water Conservancy District and the Department of Interior regarding water supplies.

[10]In support of this assertion, Ashley Creek cites to 669 of SF's appendix. This citation is to the text of Ashley Creek's own memorandum in opposition to SF's motion for summary judgment. That memorandum does assert that Ashley creek began negotiations with the BLM to acquire an appropriate parcel of land in Rock Springs for drying and loading facilities. Nevertheless, the cited exhibits attached to the memorandum do not support the proposition. Instead, the referenced exhibits relate exclusively to negotiations between Ashley Creek, the Department of the Interior, and the Uintah Water Conservancy District regarding water supplies for a potential mining project. Accordingly, Ashley Creek has not directed this court to any record support for the assertion. We further note that Ashley Creek's consistent practice of citing to its own factual assertions in its various legal memoranda filed below, rather than citing to the relevant portions of the record supporting a given factual assertion has seriously delayed

(7) preliminarily designed a mining operation[11]; (8) preformed a preliminary feasibility study; (9) commenced initial negotiations with potential customers[12]; (10) inquiries regarding financing[13]; (11) formed a corporation

---

the resolution of this appeal.

[11]It is far from clear how this supposed preparatory step is different from the fifth preparatory step identified by Ashley Creek as both are supported by the same ultimate citation to a Notice of Intention to Commence Mining Operations and Mining and Reclamation Plan, Form MR-1.

[12]In support of this assertion, Ashley Creek cites to three separate pages of its memorandum in opposition to SF's motion for summary judgment. Although the memorandum does use the term "customers," only one customer, Cominco, is identified and supported by a citation to record evidence.

[13]In support of this assertion, Ashley Creek cites to page 669 of SF's appendix, again a citation to Ashley Creek's memorandum in opposition to SF's motion for summary judgment rather than a citation to record evidence. The only relevant material on the referenced page is the following paragraph:

> Discussions with potential customers and regarding financing were necessarily preliminary and inconclusive. While a number of correspondents indicated interest if the pipeline were constructed and available at economic rates, in the absence of a reliable statement of pipeline transport costs, no estimate of Ashley Creek's potential price for phosphate customers FOB Rock Springs could be given potential customers allowing discussions to go further. Absent clear expressions of interest from potential customers, discussions of financing could not progress.

The assertions in Ashley Creek's memorandum regarding commencing inquiries as to financing are not supported by a citation to record evidence. Accordingly, Ashley Creek has once again directed this

to carry on the business. These very preliminary steps are insufficient to show preparedness to enter the market.

First, as noted by the district court, Ashley Creek had no financing commitment and was in no position to obtain financing. In particular, Ashley Creek has not cited to a single piece of record evidence indicating that it made even a preliminary inquiry regarding financing of a mining and milling operation, an operation which Ashley Creek itself estimated to cost in excess of $67 million. Even if it had made such contacts, Ashley Creek does not contest the district court's conclusion that the "Type 1" feasibility study conducted by Ashley Creek was completely insufficient for such purposes. Nor had Ashley Creek consummated any of the contracts necessary to operate a phosphate mine. The record citations provided by Ashley Creek on appeal show only that it engaged in negotiations regarding water supplies

---

court to a portion of the voluminous record that does not support its factual assertions. Counsel is reminded that this court "will not search the record in an effort to determine whether there exists dormant evidence which might require submission of the case to a jury." *Gross v. Burggraf Constr. Co.*, 53 F.3d 1531, 1546 (10th Cir. 1995). Accordingly, Ashley Creek has provided no record support for the assertion that it made initial inquiries regarding financing.

to the proposed mine and that it discussed sales of phosphate concentrate with Cominco without ever discussing a price. Furthermore, although Ashley Creek notes that it commenced the application process for a mining permit, that is only one of the many permits necessary to develop and operate the mine, it points to no record evidence that it ever obtained the necessary permits. In fact, the record demonstrates that when Ashley Creek filed its mining plan and applied for a mining permit in March of 1986, the application was rejected on multiple grounds. Finally, it is clear that Ashley Creek did not have the necessary experience and background in the business of selling phosphate concentrate. Ashley Creek has never had any paid employees. Archer, the sole shareholder, pays all of Ashley Creek's bills and runs the corporation out of his house. Although Archer has been in the business of acquiring and selling mineral properties and reserves, neither he nor Ashley Creek has ever developed or operated a mine. For these reasons, we agree with the district court that Ashley Creek was not prepared to enter the market at the point when Chevron refused to publish a tariff. Furthermore, as set out at length in the district court's opinion, *Ashley Creek Phosphate Co. v. Chevron*, 129 F.Supp.2d 1299, 1304-05 (D. Utah 2000), Ashley Creek did not take any further, meaningful preparatory steps at any point after Chevron and SF filed a series of successively lower tariffs. Accordingly, the district court correctly concluded that Ashley Creek lacked standing under Section 4 of the Clayton Act for its injury to business claim, having failed to demonstrate that it was prepared to enter the market.

This court also agrees with the district court that

Ashley Creek's lack of preparation is not excused by a futility exception to the preparation requirement. As Ashley Creek quite correctly notes, several courts have recognized that in order to show preparation to enter a given market, an antitrust plaintiff need not take those steps which would have been rendered futile by an alleged monopolist. *See, e.g., Thompson v. Multi-List, Inc.*, 934 F.2d 1566, 1572 (11th Cir. 1991) ("[A] defendant cannot benefit by the application of the standing doctrine from the fact that it is able to prevent the plaintiff from becoming a [competitor].") *Fleer Corp. v. Topps Chewing Gum, Inc.*, 415 F. Supp. 176, 180 (E.D. Pa. 1976) ("It would be inconsistent with one purpose of the Clayton Act – to protect the business interests of the victims of monopolistic practices – to require an antitrust plaintiff to pay a courtroom entrance fee in the form of an expenditure of substantial resources in a clearly futile competitive gesture."). Although this court has not yet addressed the issue, we have no doubt that there exists some type of futility exception to the preparation requirement set out in *Curtis*. Whatever the parameters of such an exception, however, it clearly does not excuse Ashley Creek from performing the most basic preparatory steps to determine whether: (1) there was a market for phosphate concentrate and, if so, what price customers were willing to pay; (2) the exact nature of its reserves; and (3) its own costs from the railhead in Rock Springs, in order to determine whether it could profitably sell concentrate even if the tariff were set at zero. Without undertaking the basic preparatory steps to answer these questions, Ashley Creek has absolutely no basis for showing that its "business" was in any way damaged by the allegedly exclusionary tariffs or other factors. *See Ashley Creek*, 129 F. Supp. 2d at 1305 (quoting following from 1993 statements of David Aro,

Ashley Creek's consulting mining engineer: "I have felt for some time that the level of *legal effort* far exceeds the level of *technical data* that is essential to verifying the reserves and costs. Without `proven' reserves and `acceptable' costs, the legal arguments could be `hypothetical and meaningless'").

Ashley Creek's futility argument boils down to an assertion that a proposed market participant need take no further preparatory steps, even of the most basic and preliminary nature, after an asserted violation of the antitrust laws by the party in control of an essential facility. Such an approach would eviscerate the standing requirement, rendering it wholly dependent on the merits of the plaintiffs case. *See Gas Utilities Co. of Ala., Inc. v. S. Natural Gas Co.*, 825 F. Supp. 1551, 1573 (N.D. Ala. 1992) (holding that plaintiff could not use defendant's denial of access to a pipeline to create an inference of antitrust injury to business or property). Allowing an antitrust plaintiff to recover merely upon a showing of a violation of the act, without a demonstration of injury-in-fact, would conflict with this court's precedent. *See City of Chanute*, 955 F.2d at 652 ("A violation of the Act without resultant injury to [plaintiff] is insufficient to confer standing." (quotation omitted)). Furthermore, none of the cases cited by Ashley Creek support its assertion that this court should adopt such an expansive reading of the futility doctrine. In the very cases cited by Ashley Creek, the courts applied the four-factor preparedness test and analyzed whether the plaintiff had presented adequate evidence of concrete preparedness. *See,* e.g., *Thompson*, 934 F.2d at 1572 (applying preparedness requirement and finding standing when plaintiff was already an established

realtor in the market served by t he defendant board of realtors and multiple listing service); *Jayco Sys. V. Savin Bus. Mach. Corp.*, 777 F.2d 306, 314 (applying four-part test and finding standing only for injury to plaintiff's normal course of business, not to its proposed business expansion); *Hecht*, 570 F.2d at 994 (applying four-part test and noting that plaintiff's preparation must be at "a stage where it is accompanied by certain indicia of ultimate success").

For these reasons, in addition to those separate reasons set out by the district court,[14] we conclude that Ashley Creek's almost complete failure to prepare to enter the phosphate concentrate market is not excused by the futility doctrine.

2. Injury to Property

Ashley Creek also claims standing flowing from injury to its property, i.e., the mineral leases. It is uncontested that Ashley Creek's mineral leases constitute "property" for purposes of Section 4 of the Clayton Act. In rejecting Ashley Creek's assertion that it had standing to raise its antitrust claims solely by virtue of its mineral leases, the district court concluded as follows:

> The mineral leases (for which Archer or Ashley Creek now pays a little over $11,000 per year) is only one minor component in the development

---

[14] *Ashley Creek*, 129 F. Supp. 2d at 1305-06; *see also supra* pp. 18-19 (discussing district court's analysis of Ashley Creek's futility claim).

> of a project that Ashley Creek admits would have cost $67 million in capital in 1990. Because Ashley Creek has not established the necessary steps to show its viability in that market, it would be too speculative and remote to recognize the leasehold interest as being injured. The mineral leases only hold value if the minerals can be economically mined, milled, and sold. Without showing that its leases could be developed economically, Ashley Creek can only speculate on the leases' value.

Ashley Creek, 129 F. Supp. 2d at 1307. On appeal, Ashley Creek asserts that the district court erred in applying the preparation rule from *Curtis* to its claim of injury to property. Instead, Ashley Creek posits that its "leases represent a value protected by Section 4 of the Clayton Action without more." Appellant's Br. at 25. In support of this assertion, Ashley Creek relies on a 1964 district court decision in *Waldron v. British Petrol. Co.*, 231 F. Supp. 72 (S.D.N.Y. 1964).

We reject Ashley Creek's assertion that possession of property alone confers standing. The language of the Clayton Act makes clear t hat it is the injury to property, rather than its mere possession, that confers standing. *See* 15 U.S.C. § 15(a) ([A]ny person who shall be injured in his . . . property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States . . . ."). In this case, there is no evidence that Chevron or SF clouded Ashley Creek's title to the leases. Nor is there any evidence that the leases were less valuable after the supposedly anti-competitive acts than they were before those

acts.[15] In fact, there is not a single citation to the record in that section of Ashley Creek's brief relating to its claim of injury to property. In reality, Ashley Creek's claimed injury relates to a proposed business – a phosphate concentrate supply business that would have used the mineral leases. To

---

[15]The history of these particular mineral leases reveal multiple failed attempts to develop the phosphate deposits. Archer first acquired the leases from Utah in 1963; he immediately sold the leases to Mountain Fuel Supply Company. Mountain Fuel failed to develop a mine and, instead, allowed the leases to lapse. Archer reacquired the leases in 1974 and assigned them to Utah International in 1975. Utah International also failed to develop a mine, after determining that development was not feasible at then-current and projected phosphate prices. After the leases were re-assigned to Archer in 1984, he attempted to sell them to Chevron and Cominco. Both companies indicated that they were not interested. In 1997, Archer approached Agrium about its interest in investing in the leases. Agrium declined the invitation. Accordingly, the record reveals that every company Ashley Creek approached has failed to decline to develop the leases.

have standing to allege injury to an inchoate business interest, Ashley Creek must establish its preparedness to enter the market. As set out at length above, however, Ashley Creek has utterly failed to demonstrate that it was prepared to develop the mineral leases. In these narrow circumstances[16], this court concludes that the district court properly considered Ashley Creek's lack of preparedness to enter the phosphate concentrate market in analyzing whether Ashley Creek and demonstrated an injury to its mineral leases.

The district court opinion in *Waldron* is not to the contrary. In *Waldron*, the plaintiff had a "highly desired contract" with the Iranian Oil Company to purchase oil. 231 F. Supp. at 78. The plaintiff alleged a conspiracy among the defendant major oil companies to refuse to purchase either oil or the contract from the plaintiff. *See id.* at 79-81, 86-87. The court held that although the plaintiff could not claim standing based on injury to his business because he was not prepared to enter the business of selling oil, he did have standing based on injury to his property in the form of the contract itself. *See id.* at 87. In contrast, the record in this case is completely devoid of evidence relating to the value of the leases during the relevant times periods. Accordingly, Ashley Creek has simply not put forward even a scintilla of evidence to demonstrate that it suffered any harm to its property at the hands of Chevron and SF.

---

[16]That is, when the plaintiff's claimed injury to property flows from its claim that it would have used the property as part of an anticipated business venture.

III. Conclusion

For those reasons set out above, this court concludes that Ashley Creek has failed to adduce evidence from which a trier of fact could conclude that it has suffered an antitrust injury to either its business or property. We therefore **affirm** the district court's dismissal of Ashley Creek's antitrust claims for lack of standing. Our conclusion that Ashley Creek lacks standing to assert its antitrust claims obviates the need to address the district court's alternative conclusion that tariffs charged by Chevron and SF were reasonable. This court offers no opinion on that question.

Appeal No. 014066

Pages 33-49 of the original text concern an appeal regarding state law counterclaims. They are unrelated to this petition.

CONCLUSION

For those reasons set out above, the United States District Court for the district of Utah is hereby **AFFIRMED** in Nos. 01-4017 and 01-4031. In No. 01-4066, the appeal is **DISMISSED** in part, the district court is **REVERSED** in part, and the matter is **REMANDED** to the district court for further proceedings consistent with this opinion. All other outstanding motions are hereby **DENIED**.

TAB 2

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

ASHLEY CREEK PHOSPHATE COMPANY,

Plaintiff-Counter-Defendant-Appellant,

and

STATE OF UTAH,

Plaintiff-Counter-Defendant,

v.

CHEVRON USA, INC. et al.,

Defendants-Counter-Claimants-Appellees.

No. 01-4017

ASHLEY CREEK PHOSPHATE COMPANY,

Plaintiff-Counter-Defendant,

and

STATE OF UTAH,

No. 01-4031

Plaintiff-Counter-
Defendant-Appellant,

v.

CHEVRON USA, INC. et al.,

Defendants-Counter-
Claimants-Appellees.

ORDER
Filed January 22, 2003

Before **KELLY, BRORBY,** and **MURPHY,** Circuit Judges.

Ashley Creek Phosphate Company's petition for rehearing is denied.

Entered for the Court
PATRICK FISHER, Clerk of the Court

by: /s/
Deputy Clerk